White House

STAT

CENTRAL INTELLIGENCE AGENCY
Office of Legislative Counsel
Washington, D. C. 20505
Telephone: [redacted]

STAT

2 JUL 1975

TO: Mr. John O. Marsh, Jr.
Counsellor to the President
The White House

As you are aware, a number of proposals directly affecting CIA and the intelligence community have been introduced in the 94th Congress. My staff has prepared a summary of the major topics we will probably have to deal with before the 94th Congress adjourns. I thought you would be interested in a copy of the summary.

SIGNED

George L. Cary
Legislative Counsel

FORM 6-68 1533 OBSOLETE PREVIOUS EDITIONS

(40)

STAT

CENTRAL INTELLIGENCE AGENCY
Office of Legislative Counsel
Washington, D. C. 20505
Telephone: [redacted]

1975

WH

TO: Mr. Max Friedersdorf
Assistant for Legislative Affairs
The White House

Max -

As you are aware, a number of proposals directly affecting CIA and the intelligence community have been introduced in the 94th Congress. My staff has prepared a summary of the major topics we will probably have to deal with before the 94th Congress adjourns. As I mentioned to you on the phone, I thought you might be interested in a copy of the summary. Some of these topics, such as congressional review of executive agreements and Freedom of Information Act amendments, have applicability wider than just the intelligence community. I think these two subjects warrant discussion at the next Legislative Interdepartmental Group meeting. I am also including a classified memorandum on pending electronic surveillance legislation.

STAT [redacted]

STAT [redacted] George L. Cary
Legislative Counsel

CLASSIFIED DOCUMENT ATTACHED

FORM 6-68 1533 OBSOLETE PREVIOUS EDITIONS (40)

Summary of Various Legislative Proposals of Interest to the Central Intelligence Agency

A. Congressional Review of Executive Agreements

B. Freedom of Information Act Amendments

C. National Security Act Amendments

D. Privacy Act Amendments

E. CIA Oversight by Congress

F. GAO Audits of Intelligence Agencies

G. Financial Disclosure

CONGRESSIONAL APPROVAL OF EXECUTIVE AGREEMENTS

Several bills have been introduced which would subject Executive agreements to congressional review. These include S. 632, introduced by Senator Bentsen; S. 1251, introduced by Senator Glenn, and its companion bill H. R. 5489, introduced by Representative Spellman; and H. R. 4438, introduced by Representative Morgan and by 22 other members of the House International Relations Committee.

Each of these bills proposes similar congressional review procedures. Executive agreements would be transmitted to Congress and would come into force after a 60-day period unless disapproved by both Houses. If the President believes disclosure of an agreement would prejudice national security, the agreement would be transmitted to the Senate Foreign Relations and House International Relations Committees under a "written injunction of secrecy." The committees would thereupon make the secret agreements available for inspection only by members of their respective Houses.

These bills have been spawned by the belief that the Senate's treaty-making authority, which it shares with the President, has been bypassed by the device of the Executive agreement. The practical and constitutional impact of these bills hinges on the scope of their definition of Executive agreement.

(a) S. 632 defines Executive agreement as "any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee, or representative of the executive branch ... "

(b) S. 1251 defines the term as "any bilateral or multilateral international agreement or understanding, formal or informal, written or verbal, other than a treaty, which involves, or the intent is to leave the impression of, a commitment of manpower, funds, information, or other resources of the United States, and which is made by the President or any officer, employee, or representative of the executive branch ... "

(c) H. R. 4438 defines Executive agreement as "any bilateral or multilateral international agreement or commitment, regardless of its designation, other than a treaty, and including an agency-to-agency agreement, which is made by the President or any officer, employee, or representative of the executive branch ... " Only Executive agreements "concerning the establishment, renewal, continuance, or revision of a national commitment" are required to be reported to Congress under this bill. However, the term "national commitment" is defined

as "any agreement or promise, (1) regarding the introduction, basing, or deployment of the Armed Forces of the United States on foreign territory; or (2) regarding the provision to a foreign country, government, or people, any military training or equipment including component parts and technology, any nuclear technology, or any financial or material resources."

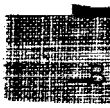
Because these definitions of Executive agreement are so expansive, and the "secrecy" provisions of these bills are so palpably inadequate, their enactment would severely cripple the national intelligence effort both with respect to intelligence-gathering and nonintelligence-gathering activities.

Cooperation with foreign counterpart services is absolutely essential to successful intelligence collection. Formal or informal, such relationships usually involve a quid pro quo and may be on regular or ad hoc basis. Because in many cases foreign services would cease cooperation if there were even a risk of disclosure or acknowledgment of their relationship, the bills reviewed above would destroy much essential liaison by subjecting it to plenary congressional review and approval.

Sometimes formal or informal arrangements with foreign governments are necessary to facilitate foreign intelligence collection. Such an arrangement may be necessary to establish an intelligence-gathering facility in a foreign country, for example. Proposed legislation would effectively preclude any intelligence collection where such collection is predicated on bilateral or multilateral arrangements, because actual disclosure of these agreements would nullify the collection effort itself and, in many cases, the mere risk of public disclosure or acknowledgment would inhibit foreign governments from entering into such arrangements.

Finally, agreements with other countries may be necessary in conducting nonintelligence-gathering operations. In these cases, the legislation reviewed above would supersede and expand the reporting provisions of section 32 of the Foreign Assistance Act of 1974 by requiring full congressional review and approval of such action. This requirement would preclude undertaking such operations.

These bills also raise constitutional issues. The Constitution requires Senate approval of treaties, and insofar as an Executive agreement finds its source solely in the President's treaty-negotiating authority, the Senate may have a valid basis for participating in its formulation. However, some Executive agreements may be rooted in other sources of Presidential power, such as the President's prerogatives as Commander-in-Chief or his special powers in the foreign relations field. These powers are not shared with the Congress. Agreements entered into in the exercise of these powers cannot be characterized as an "evasion" of the Senate's treaty-making powers, and the President may not constitutionally be compelled to submit them for congressional approval.



FREEDOM OF INFORMATION ACT AMENDMENTS

S. 1210, a bill to amend the Freedom of Information Act (5 U.S.C. 552), is pending before the Subcommittee on Administrative Practice and Procedure. Senator Kennedy introduced the bill and held hearings on it on April 28 and 29, and June 12. The bill implicitly recognizes the right of a federal employee to disclose to any person information which is obtainable under the Freedom of Information Act (FOIA), and prohibits an agency from taking any adverse personnel action against an employee who so discloses. The bill does not make clear whether an employee must seek authorization from designated agency FOIA officials before releasing a document, or whether he can release a document predicated on his own belief that the document is not exempt from release.

The recent Freedom of Information Act amendments (P. L. 93-502) have dramatically increased the workload of federal agencies in dealing with these requests. CIA, for example, has found it necessary to assign over fifty of its employees to work full time handling FOIA requests. Numerous other Agency employees are also involved in processing these requests on less than a full-time basis. The one saving grace of the present law is that it permits agencies to centralize their handling of these requests, so that designated agency representatives determine what can be released, and what can and must be withheld. S. 1210, if interpreted to allow employees to reach their own decision on what can be released, would destroy this structure, and thereby destroy agency attempts to deal with the Freedom of Information Act in a methodical, organized manner.

If it is the intent of the bill to require an employee to obtain official screening and approval before releasing a document, such fact needs to be clearly stated in the bill. This would alleviate the major potential problem with the bill, but others would remain. These include:

1. Section 102(c) of the National Security Act of 1947 (50 U.S.C. 403) grants the Director of Central Intelligence the power to terminate the employment of any CIA employee when in his complete discretion, such termination would be necessary or advisable in the interests of the United States. The restriction in S. 1210 on adverse personnel actions is inconsistent with the statutory authority of the DCI.

2. The bill provides a perfect tool for disgruntled agency employees to work against their agency, rather than working from within to correct deficiencies as they see them. Also, under the guise of protecting employees from retributive agency action, the bill could subject employees to new pressures and impose very serious responsibilities on individuals who are without corresponding expertise. Investigative reporters and other outsiders could badger

employees to obtain and release documents. If employees may release documents when they personally believe them to be releasable under the FOIA, the bill would subject employees to substantial risks. If the employee releases materials which should have been withheld under FOIA, no protection is afforded employees. If the release amounts to a security violation, the consequences of the release could well be quite serious for the U. S. Government, and for the employee.

3. Section (f)(1)(B) establishes the right of employees to make any information whatsoever available to Members of Congress, even information protected from public disclosure under exceptions to the Freedom of Information Act. This section would frustrate and confuse agency attempts to report to Congress through orderly channels. It would also contradict congressionally-established procedures of restricting access to sensitive intelligence information to the intelligence oversight subcommittees. Finally, it could create a major complication for the Director in discharging the responsibility placed upon him by the Congress to protect Intelligence Sources and Methods from unauthorized disclosure (50 U.S.C. 403).

4. Proposed section (f)(4) of the bill creates a presumption that any adverse personnel action taken against an employee within one year after that employee released information under the FOIA is predicated on the release of the information. This section would readily lead to abuses, by encouraging employees who were in danger of adverse personnel action to release material in order to gain unwarranted advantage of the presumption.

NATIONAL SECURITY AND CIA ACT AMENDMENTS

Key Bills

During the 93rd Congress, Senator Stennis, Senator Proxmire, Representative Nedzi, and others introduced proposals to amend the CIA section of the National Security Act of 1947. Senator Proxmire (S. 244) and Representatives McCloskey (H.R. 628), Dellums (H.R. 343), and Findley (H.R. 5873) have introduced National Security Act amendments in the 94th Congress. During the 93rd Congress, the Senate approved an amendment to the Fiscal 1975 Defense Authorization bill (H.R. 14592), which incorporated the Proxmire language, but the amendment was rejected in conference on the point of germaneness. Representative Nedzi held hearings on his bill in July 1974, but his Armed Services subcommittee did not report a bill. No action by the 94th Congress is expected until the House and Senate Select Committees currently investigating the Agency make their recommendations.

Various Provisions

Following are the specific proposed amendments to the Act which appear in one or more of the bills introduced in the 93rd or 94th Congress.

1. Insert the word "foreign" before the word "intelligence" in the Act, wherever it refers to the activities authorized to be undertaken by the Central Intelligence Agency (Stennis, Proxmire, Nedzi, Bennett bills).

2. Reiterate existing prohibitions against CIA assuming any police or law-enforcement powers, or internal-security functions (Stennis, Proxmire, Nedzi bills).

3. Enumerate permissable activities for the CIA in the United States:

   (a) Protect CIA installations;

   (b) Conduct personnel investigations of employees and applicants, and others with access to CIA information;

   (c) Provide information resulting from foreign intelligence activities to other appropriate agencies and departments;

   (d) Carry on within the United States activities necessary to support its foreign intelligence responsibilities.

The Stennis, Proxmire, and Nedzi bills include (a), (b), and (c), but only the Nedzi and Stennis bills include item (d), which is considered to be an essential proviso.

4. Require the CIA to report to Congress on all activities undertaken pursuant to section 102(d)(5) of the National Security Act (this proposal was somewhat overtaken by enactment of section 32 of P. L. 93-559 requiring Presidential finding and covert action reporting to six committees of the Congress--oversight committees and foreign affairs committees of both Houses) (Nedzi, Proxmire, and Stennis).

5. Require the Director to develop plans, policies, and regulations in support of the present statutory requirement to protect Intelligence Sources and Methods from unauthorized disclosure, and report to the Attorney General for appropriate action any violation of such plans, policies, or regulations. This requirement shall not be construed to authorize CIA to engage in expressly prohibited domestic activity (no police, subpoena, or law-enforcement powers, or internal-security functions) (Nedzi and Stennis).

6. Prohibit CIA from participating, directly or indirectly, in any illegal activity within the United States (Proxmire and Dellums).

7. Prohibit transactions between the Agency and former employees, except for purely official matters (Nedzi).

8. Prohibit covert action (McCloskey and Dellums).

9. Limit the DCI to eight years in office (Dellums).

10. Provide that the positions of the Director and Deputy Director may not be simultaneously occupied by individuals who were employed by CIA during the five years prior to their appointment (Dellums).

11. Require advance approval of the four oversight committees before assistance of any kind is provided to a federal, state, or local governmental agency (Dellums).

12. Require the Agency to prepare special reports on foreign situations at the request of specified committees of Congress, and provide for the availability of these reports to all members of Congress (Findley).

13. Establish a criminal penalty for a violation of the prohibition on the Agency assuming police, subpoena, law-enforcement powers, or internal-security functions (Findley).

14. Expressly subject Agency employees testifying before the Congress to existing United States Code provisions regarding perjury and witness' privileges (Findley).

15. Add a statutory directive that the Agency collect intelligence (Bennett).

16. Require the Agency to notify American citizens when it is collecting intelligence from them within the United States or its possessions, except pursuant to published Executive Order (Bennett).

17. Limit the authority of the Director to protect Intelligence Sources and Methods from unauthorized disclosure within the United States to

(a) lawful means used to prevent disclosure by present or former employees, agents, sources, or persons or employees of persons or organizations who contract with the Agency or are affiliated with it; and

(b) provide guidance and technological assistance to other Federal departments and agencies performing intelligence functions (Bennett).

PRIVACY

The 93rd Congress enacted landmark privacy legislation, (P.L. 93-579), which will become effective in September 1975. In drafting the Privacy Act, Congress recognized that "certain areas of Federal records are of such a highly sensitive nature that they must be exempted" (House Report 93-1416). Accordingly, Congress exempted systems of records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" [subsection (k)(1)], and Central Intelligence Agency records [subsection (j)(1)] from portions of the Act. Sections of the Act which do apply to CIA prohibit the dissemination of records except for specific enumerated purposes, require the Agency to maintain a listing of each disclosure of a record for at least five years, and publish annually in the Federal Register a general description of our systems of records concerning American citizens or permanent resident aliens. The Agency is exempt from the section granting citizens or permanent resident aliens access to records held on them by federal agencies.

Proposals by Representative Abzug (H.R. 169, 2635) would strike the exemption for CIA records. Ms. Abzug, who led an unsuccessful floor fight during the 93rd Congress to strike the committee-sponsored CIA exemption, is now Chairperson of the House Government Operations Subcommittee on Government Information and Individual Rights, which has jurisdiction over the Privacy and Freedom of Information Acts. She held well-publicized hearings on this subject on March 5 and June 25, at which the Director testified.

Although some CIA information can be protected by the section (k)(1) exemption for national defense or foreign policy information, this exemption would not fully protect Intelligence Sources and Methods information contained in the Agency's system of records. An intelligence document can reveal sources and methods and warrant protection even though the substantive information conveyed does not jeopardize the national defense or foreign policy. An example may help explain this. A and B, U. S. citizens, attend a scientific conference abroad of foreign intelligence interest to the United States. A voluntarily provides the Agency confidential information on the conference and includes information concerning B, or a foreign asset reports on the conference and includes information on A and B. Disclosure of the information on either A or B could reveal A or the foreign asset as the source of the information.

An exemption in the Act for foreign intelligence sources and methods, rather than the present exemption for CIA records is satisfactory. This point has been made during the hearings, but Ms. Abzug seems determined to push for the elimination of the CIA exemption, without a substitute sources and methods exemption.

CIA OVERSIGHT PROPOSALS

The longstanding congressional oversight procedure of reporting on Agency operations only to the Armed Services and Appropriations Committees of both houses was significantly altered by the Foreign Assistance Act of 1974, which requires reporting on covert action to the foreign affairs committees of both Houses. This means six committees now receive reports on covert operations. Other, more far-reaching proposals have been introduced in the 94th Congress. The Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations held hearings on 9 and 10 December 1974 regarding CIA oversight. Senator Muskie, Chairman of this Subcommittee, originally announced additional hearings for early 1975, but is deferring to the Senate Select Committee.

Following are sketches of proposals to alter the permanent CIA oversight mechanism. All House bills on oversight have been referred to the Rules Committee. Jurisdiction of the Senate bills is split between the Armed Services, Government Operations, and Rules Committees.

1. Joint Committee on Intelligence Oversight (S. 317, H.R. 463)

Senators Baker and Weicker and twenty-five co-sponsors introduced the Senate proposal in the 93rd Congress and again in January. Senators Baker and Weicker spoke in favor of their bill during the Muskie hearings last December. Representatives Frenzel and Steelman introduced the companion House bill. The Joint Committee on Intelligence Oversight would have fourteen members, appointed by the leadership, and the chairmanship would alternate between the House and Senate members for each Congress. The legislative jurisdiction of the Committee would extend to CIA, FBI, Secret Service, DIA, NSA, and all other governmental activities pertaining to intelligence gathering or surveillance of persons. Heads of all named departments would be required to keep the Committee fully and currently informed of all activities.

2. Joint Committee on National Security (S. 99, H.R. 54)

This bill was introduced in the 93rd and 94th Congresses by Senator Humphrey. Representative Zablocki is the House sponsor. Dr. Ray Cline, formerly a CIA official and later the Director of the Bureau of Intelligence and Research, Department of State, spoke in favor of this proposal during the Muskie hearings.

The Joint Committee on National Security would consist of the Speaker, Majority and Minority members of each house, the chairman and ranking Minority members of the Armed Services, Appropriations, foreign affairs, Joint Atomic Energy Committees, three other Representatives, and three other Senators.

Proposed functions of the Committee are to study foreign, domestic, and military national security policies, study the National Security Council, and study government classification practices, and report periodically to each House on the Committee's findings. This bill would apparently not change any present jurisdiction (e.g., the Armed Services Committees would retain legislative jurisdiction over CIA); it would merely supplement it.

3. Joint Committee on the Continuing Study of the Need to Reorganize the Departments and Agencies Engaging in Surveillance (S. 189)

Senators Nelson, Jackson, and Muskie introduced this proposal. Senator Nelson introduced a similar proposal last Congress, and supported it during the Muskie hearings. This committee would be composed of eight Senators and eight Representatives, with an equal party split. The Committee would be empowered to study the need to reorganize U. S. agencies engaged in investigation or surveillance of individuals (citizenship not specified), the extent, methods, authority, and need for such investigation or surveillance, and the state-federal relationship in this area. The Joint Committee would not have jurisdiction to examine activities conducted outside the United States, but may recommend means for Congress to oversee such extraterritorial activity.

4. Joint Committee on Information and Intelligence (S.Con.Res. 4)

Senator Hathaway is the sponsor of this proposal. It would create a fourteen-member joint committee to study the activities of each information and intelligence agency and their interralationships.

5. Several other House bills or resolutions would create joint committees to assume CIA oversight and would either have members appointed by the leadership or drawn from specified committees (such as Armed Services, Appropriations, Foreign Relations, International Relations, and Government Operations). Among this group are H.R. 261, H.Con.Res. 18, H.R. 2232. H.Res. 51 would create a new standing committee of the House entitled the Committee on the Central Intelligence Agency.

6. Mr. Dellums has reintroduced the "Central Intelligence Agency Disclosure Act," H.R. 1267, amending certain statutory authorities to modify Agency exemptions in the area of reporting to Congress. The bill would impose a positive duty on the Agency to report to congressional committees and subcommittees upon request sensitive details on prospective activities, contracts, and covert funding, information already available to appropriate oversight committees under current procedures. The Agency would also be required upon request to provide any substantive and operational information to any congressional committee or subcommittee relating to any matter within its jurisdiction. These provisions would proliferate sensitive information on Agency operations throughout the Congress and fragment oversight responsibilities.

GENERAL ACCOUNTING OFFICE AUDITS

Senator Proxmire has introduced S. 653, amending the Budget and Accounting Act of 1921. This bill would authorize the Comptroller General to conduct an audit of the accounts and operations of an intelligence agency, when requested by a congressional committee with legislative jurisdiction of that agency. The legislation states this audit shall be conducted notwithstanding the provision of section 8(b) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403).

Section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403) charges the Director of Central Intelligence with protecting Intelligence Sources and Methods from unauthorized disclosure. One of the key statutory tools assisting the Director in this pursuit is section 8, which would be severely eroded by enactment of S. 653. Section 8(b) states:

> "(b) The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

Officials of GAO have expressed their support for this unique authority.

GAO began auditing CIA's vouchered accounts in 1949, and began an expanded audit in 1959. However, the Agency, with approval of the congressional oversight committees, did not permit GAO to inspect our most sensitive records. As a result of GAO's insistence that it did "not have sufficient access to make comprehensive reviews on a continuing basis that would be productive of evaluations helpful to the Congress," the audit was terminated in 1962. CIA responded by establishing additional internal audit and review procedures, which observe the same audit principles and standards as the GAO.

The Agency believes section 8(b) must not be encumbered in any way. It is extremely important to the Director's ability to protect Intelligence Sources and Methods from unauthorized disclosure. The Agency has always felt that an arrangement could be reached which would comport with GAO audit requirements while not jeopardizing Intelligence Sources and Methods. However, we oppose any legislation which would authorize any additional access to our most sensitive records.

FINANCIAL DISCLOSURE

Bills introduced in both Houses would require federal employees receiving specified salaries (e.g., above $25,000 per year) to file financial statements with the Comptroller General. One bill would only require a statement of assets and liabilities, while most of the bills require a listing of:

(a) amount and source of each item of income and gift over $100;

(b) value of each asset held by him solely or jointly with his wife;

(c) amount of each liability owed;

(d) all dealings in securities or commodities;

(e) all purchases and sales of real property.

The public is to be granted access to the statements. Criminal penalties are prescribed for willfully filing false statements or failing to file a statement.

These proposals conflict with section 6 of the CIA Act of 1949, which states that "the Agency shall be exempted from the provisions of ... any other law which require(s) the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." They would also raise very serious security problems, and are contrary to the spirit of privacy so recently endorsed by the Congress.

27 May 1975

MEMORANDUM

SUBJECT: Electronic Surveillance Legislation

1. Over a dozen bills have been introduced in Congress to date aimed at restricting electronic surveillance conducted on national security grounds. Although impelled by concern for the Fourth Amendment rights of American citizens, the major bills in this area (S. 743, H.R. 141, H.R. 214) are characterized by a heavy-handed approach which poses a serious threat to the exploitation of foreign SIGINT sources, both within the United States and overseas. (Signals intelligence subsumes communications intelligence and electronic intelligence.)

2. The 1968 Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2510, et seq.) established certain procedures which require the Government to obtain a court order issued on probable cause prior to conducting wire or oral communication interception in the investigation of certain offenses. In section 2511(3) of that Act, Congress specifically disavows any limitation on the constitutional powers of the President in national security matters and recognizes that the President has inherent constitutional authority to engage in certain foreign intelligence activities:

> (n)othing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President ... to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. (emphasis added)

The emphasized language implicitly recognizes that foreign intelligence surveillances may be distinguished from national security surveillances aimed at the discovery and prosecution of criminal conspiracies and activity.

3. In reliance on these Presidential powers and congressional recognition thereof, foreign intelligence signal and communication interceptions may be conducted within the United States without judicial warrant.

4. Sentiment that the provisions of 18 U.S.C. 2511(3) (quoted above) are incompatible with Fourth Amendment rights has spawned a Senate bill and over a dozen House bills (some of these identical) aimed at closing what the sponsors view as "the national security loophole" in current surveillance laws. A distinctive approach to national security surveillance is taking shape which would prohibit the use of warrantless surveillance for any reason whatsoever, treating national security surveillance under a single rubric, without distinguishing between gathering foreign intelligence on the one hand, and national security surveillances aimed at the discovery and prosecution of criminality, on the other.

(a) S. 743 by Senators Nelson and Kennedy would amend 18 U.S.C. 2510, et seq., as follows: First, repeal 18 U.S.C. 2511(3) thereby withdrawing whatever congressional recognition that section gave the foreign intelligence surveillance powers of the President. Second, prohibit intercepting the communications of an American citizen or alien admitted for permanent residence until a prior judicial warrant is obtained issued on probable cause that a specific crime, e.g., espionage, has been or is about to be committed. Third, prohibit intercepting the communication of a foreign power or its agent until a prior judicial warrant is obtained by establishing probable cause (a) that such interception is necessary to protect the national defense (note narrower standard than national security); (b) that the interception will be consistent with the international obligations of the United States; and (c) that the target is a foreign power or foreign agent. (A foreign agent is defined as any person, not an American citizen or alien lawfully admitted for permanent residence, whose activities are intended to serve the interests of a foreign power and to undermine the national defense. Each application for such an interception would be made to the D. C. Federal District Court on personal and written authorization of the President and would provide detailed information on the target, the purposes and justification of the interception.) Upon court approval, only the FBI would be authorized to intercept the communication. Fourth, require that every American citizen targetted be informed of the specifics of the surveillance within a month of the last authorized interception. (This disclosure could be postponed if the Government satisfies the court that the target is engaged in a continuing criminal enterprise or that disclosure would endanger national security interests. A foreign power or its agent need not be informed of interceptions.) Fifth, require the Attorney General to report to the Congress, at least quarterly, the details of each interception undertaken on national security grounds, to be filed with the Senate Foreign Relations and Judiciary Committees and the House International Relations and Judiciary Committees.

(b) H. R. 141 by Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which has legislative jurisdiction for surveillance, is similar to the above bill. It would repeal 18 U.S.C. 2511(3) and amend Title 18 to permit communications interception in national security cases only under court order issued on probable cause that an individual has committed one of several enumerated offenses or is engaged in activities intended to serve the interests of a foreign principal and to undermine the national security. (From the language of the bill, it could be argued that the foreign agent's activities would have to constitute a criminal offense before a warrant could be issued.) The bill does not mention the communications of a foreign power. Each application for an interception would have to be authorized by the Attorney General and made to a Federal judge of competent jurisdiction. The targetted individual would be informed of the surveillance within ninety days. The President, Attorney General, and all Government agencies would be required to supply Congress, through the Senate Judiciary and Foreign Relations Committees and the House Judiciary and International Relations Committees, any information regarding any interception applied for.

(c) H. R. 214 by Mr. Mosher and seven identical bills co-sponsored by over 70 Congressmen from both parties, would prohibit any interception of communications, surreptitious entry, mail-opening, or the procuring and inspection of records of telephone, bank, credit, medical, or other business or private transactions of any individual without court order issued on probable cause that a crime has been committed. Like S. 743 and H. R. 141, reviewed above, H.R. 214 would repeal 18 U.S.C. 2511(3). Unlike the above bills, H.R. 214 does not provide for non-law enforcement surveillance. It would also strike out provisions for summary procedures for intercepting communications during emergencies and would require that detailed information on each application for a communication interception be reported to the House and Senate Judiciary Committees.

5. Intelligence Community Interests: These bills, through imposing judiciary administration over all surveillance, would impair existing responsibility to conduct electronic surveillance in gathering foreign positive intelligence, which now reaches wholly domestic communications, those both transmitted and received within the United States; wholly foreign communications, those both transmitted and received abroad; and transnational communications, international communications received in or transmitted from the United States.

SIGINT provides a broad range of foreign intelligence ranging from early warning indicators to the most mundane information. The importance of any single intercept or series of interceptions cannot be anticipated in advance; therefore, the probable cause standard and the proposed requirements of "particularity" are inappropriate in connection with this method of foreign intelligence collection. (Furthermore, the House bills would impair existing responsibility for using other intelligence gathering techniques against foreign subjects within the United States, e.g., medicepts, photo surveillance, etc.)

6. Effect on Intelligence Community Interests: The bills reviewed above would severely restrict domestic communications interception for foreign intelligence gathering purposes; raise serious questions respecting authority to intercept transnational communications; and would even raise questions concerning the foreign intelligence community's authority to conduct electronic surveillance abroad free from judicial intrusion or other conditions. (Moreover, the House bills would restrict the use of other intelligence gathering techniques against foreign targets within the United States.)

(a) Domestic Electronic Surveillance: An operation mounted against a foreign target within the United States to gather foreign positive intelligence would apparently not meet the court test unless the specific message targetted involved an anticipated, demonstrable and direct threat to the national defense. S. 743 explicitly confers interception authority to the FBI alone. It also explicitly raises the issue of the consistency of surveillance with international obligations, e.g., the Vienna Convention, and thus challenges the position taken by the State Department that no current international obligation precludes targetting foreign facilities within the United States.

(b) Transnational Electronic Surveillance: Proposed legislation would apparently subject the interception of transnational communications from a situs within the United States to the probable cause standard. It could also provide grounds for arguing that interceptions of transnational communications from facilities outside the United States would be subject to the same standard.

(c) Foreign Electronic Surveillance: The bills reviewed above are broadly written and the prohibitions are not expressly limited to the territory of the United States. While the reach of this legislation should be subject to the built-in limitation that the authority of a federal court to issue warrants is confined to its territorial limits, repeal of 18 U.S.C. 2511(3) and the articulation of probable cause standards for foreign intelligence gathering activities could have a grave impact on overseas intelligence collection by bringing into play a body of exclusionary rule case law (developed in ruling on the admissability in a Federal criminal trial of evidence obtained overseas by electronic surveillance). Suffice it, here, to say that this could result in

subjecting overseas foreign intelligence surveillance to the proposed probable cause standards as a test of the "reasonableness" required by Fourth Amendment protections. Moreover, this legislation could raise complex questions in situations where an element of the interception process falls within the jurisdiction of the federal court, e.g., the physical presence of the surveillance device. Even if these bills would not directly affect authority to conduct foreign electronic surveillance, they could ultimately weaken it by raising the opportunity to argue that this authority rests only on three bases--assertion of inherent Presidential intelligence-gathering powers, congressional recognition and judicial acceptance. Repeal of 18 U.S.C. 2511(3) may be viewed as weakening the argument that Congress has recognized foreign intelligence gathering authority inherent in the President and delegated to his Executive branch agents.

7. Summary:

--Proposed legislation would repeal 18 U.S.C. 2511(3) and would impose judicial administration of a "probable cause" standard over foreign intelligence electronic surveillance. At the very least, this would restrict communications interceptions against foreign targets within the United States to situations involving an anticipated, demonstrable and direct threat to the national defense. Also, this would probably subject the interception of transnational communications, from either an overseas or domestic situs, to the same judicial standards. Finally, this would raise difficult questions concerning the ability of CIA, NSA, and the service cryptologic agencies to conduct electronic surveillance overseas against foreign targets without conforming to the standards of Fourth Amendment "reasonableness" articulated in this legislation. In sum, enactment of proposed legislation would severely restrict the collection and processing of foreign SIGINT and would seriously impair the production of all-source intelligence.

--By repealing 18 U.S.C. 2511(3) and by introjecting the judiciary into the field of foreign intelligence gathering, proposed legislation raises a constitutional challenge insofar as it purports to withdraw sanction of and place limitations on the President's inherent power to conduct foreign surveillance. This infringement could undermine the Executive sources of authority upon which the intelligence community depends. To be sure, the proposed requirement of prior judicial authorization of foreign intelligence surveillances is altogether impractical. But the fundamental constitutional objection is that it purports to share Executive authority with judicial officers having no expertise in or responsibility for national security or foreign affairs. The necessity of a foreign intelligence surveillance is simply inappropriate for judicial resolution. It is a matter committed to the Executive branch by the Constitution and an area for which there are no judicially manageable standards. An arrangement by which federal judges decide what foreign intelligence the President may have in his conduct of foreign

relations is incompatible with the Chief Executive's inherent foreign intelligence gathering powers. Since this Presidential authority is constitutional in nature and stems from a fundamental separation of governmental powers, a Congressional attempt to require its sharing with the judiciary would certainly lead to protracted constitutional litigation. Moreover, Congress implicitly authorized the use of electronic surveillance in foreign intelligence activities and this legislation would circumscribe the very functions which Congress intended the Agency to perform.